

Speaker 1: Brian Marsh, Oregon WINGS Coordinator (00:01)

Welcome to the **Alternatives to Guardianship Training**. This training has been prepared by the Train the Trainer workgroup of Oregon WINGS. You'll be hearing today from Jan Friedman, senior staff attorney at Disability Rights Oregon; Alison Enriquez of the Office of Developmental Disability Services of the Oregon Department of Human Services; and Jerry Cohen, the chair of the workgroup, the past director of AARP Oregon and the representative of AARP on Oregon WINGS. Other members of the Train the Trainer workgroup whose work and time has been instrumental in preparing this training and the materials are Em Braman, Executive Director of The Arc Oregon; Mary Jager, External Affairs Director at the Department of Consumer and Business Services; Sherry Stock, Executive Director of the Brain Injury Association of Oregon; Whitney Aino, partner of Oregon Elder Law; and Paula Markowitz, the prior chair of this work group and the prior executive director at The Arc Oregon. And I am Brian Marsh, Legal Policy Advisor at the Oregon Judicial Department and Coordinator for Oregon WINGS.

(01:22):

Our **objectives in this training** are to help get a better understanding of what guardianships and conservatorships are, and more importantly, what less restrictive alternatives to guardianship and conservatorship are available and may be more appropriate for those people who need support. More information and resources are available in the Companion Trainer Guide to this presentation and on the Oregon WINGS website.

Oregon WINGS or Working Interdisciplinary Network of Guardianship Stakeholders was founded in 2013 as part of a national effort to improve outcomes for vulnerable adults. It included national organizations such as the American Bar Association, the Administration for Community Living, the National Center for State Courts, and others. Oregon WINGS represents the combined efforts of representatives from agencies and organizations who donate their time and talents to produce materials and resources such as today's training.

(02:31):

It can be helpful to understand certain terminology as we discuss guardianships and conservatorships. **Self-determination** is the ability and right that we all have to make our own decisions. A

respondent is someone for whom a guardian and conservator have not yet been appointed, but that a petition has been filed with the court. **Incapacity** means that a person does not have the ability to make their own healthcare or safety or financial decisions. It is important to understand that this is a legal term, not a medical one, and is determined by the court. The **protected person** is someone for whom a guardian or conservator has been appointed. A **fiduciary** is someone who is responsible for another person for healthcare decisions, finances, or other things. A fiduciary can be a guardian, a personal representative, a conservator, a healthcare representative or power of attorney, or others such as a trustee. **Restoration of rights** is the process by which a guardianship or conservatorship is terminated and the rights and power of self-determination are restored.

Speaker 2: Jan Friedman, DRO Senior Staff Attorney (03:39):

What is **guardianship**? It's a legal process in which a guardian is appointed and given legal authority to make medical and placement decisions for a person deemed incapacitated by the court. In order for a person to be a legal guardian, a judge must have ordered this. There must be court documents providing that

a person is a guardian. A person calling themselves “guardian” is not necessarily a legal guardian.

What are the **requirements for guardianship**? A judge appoints a guardian for a person if clear and convincing evidence shows three things: the person is incapacitated, a guardian is necessary to oversee the care and supervision of the person, and the guardian is qualified, suitable, and willing to serve. Clear and convincing evidence is the highest burden of proof in civil law, and Oregon law defines incapacitated as meaning that a person's ability to do what it takes to make and communicate a decision is so impaired that they are very likely to experience serious physical injury or illness. A guardian may not be necessary when a person has support to make their own decisions such that they are not in serious harm's way. And one factor that the judge considers in who to appoint as guardian is who the person chooses.

(05:37):

What is a **limited guardianship**? A limited guardianship occurs when a guardian is appointed for a short period of time, or the powers of the guardian are limited by the court for a specific reason. Under Oregon law, the petitioner must state whether they

are seeking a full guardianship or a limited guardianship. A court may appoint a guardian only as necessary to promote and protect the wellbeing of the protected person and only to the extent necessitated by the person's actual mental and physical limitations. A 30-day limited guardianship is also called a **temporary guardianship**. Most guardianships are permanent and last for a person's lifetime unless a judge terminates the guardianship sooner. It's important to remember that an adult protected person for whom a guardian has been appointed is not presumed to be incompetent, and they retain all legal and civil rights provided by law except those that have been expressly limited by the court order or specifically granted to the guardian by the court.

(07:08):

A guardian has all powers available to guardians under the law when there is a **full guardianship**. This is the most restrictive on civil liberties and creates the greatest loss of autonomy and self-determination for the protected person. Again, a full guardianship does not mean that the protected person has lost all rights. Instead, the protected person retains all civil rights aside from

those given to the fiduciary. In all guardianships, the guardian must consider the wishes and preferences of the protected person, and the guardian's duty is to encourage the development of maximum self-reliance and independence of the protected person.

(08:03):

Let's talk about decisions made by guardians. It's worth considering what decisions cannot be made by guardians, such as who a person is going to marry, or who a person is going to vote for, or what employment somebody wants. [There are] decisions that can be made by a guardian, and those are decisions that the judge has authorized. And then there's decisions that can only be made by a guardian if they have prior court approval. And those decisions include selling the protected person's home, moving this person, or restricting their association.

Speaker 1: Brian Marsh, Oregon WINGS Coordinator (08:54):

A **conservatorship** is a process similar to a guardianship, where a judge appoints another person called the **conservator** to administer the finances of somebody who has been deemed to be financially incapable. Clear and convincing evidence is needed to show a judge that someone is financially incapable before they

appoint a conservator. But also, it must be shown that a conservator is necessary to oversee the finances of the person. This could mean that an alternative arrangement could be used other than a conservatorship to protect the finances of the person. And third, the evidence is necessary to show that the particular person who's going to be appointed the conservator is qualified and suitable and willing to serve when they're appointed.

(09:44):

When they are appointed, conservators are to take possession of all of the property of substantial value of the protected person, including their income. They are to do this for the support, education, care, or benefit of the protected person. This allows them to engage in and fulfill financial contracts, manage the protected person's bills, bank and investment accounts, and their real property. But there are some things that the conservator can only do with court approval, like create a trust or sell the real property.

(10:18):

The authority of a court appointed fiduciary like a guardian or conservator is limited by the law of the state, and can be also

limited by the judgment signed by the judge. They should also follow the best practices as set by the **National Guardianship Association**. This includes using **substituted judgment**, meaning that the fiduciary substitute their own judgment for what the protected person would've decided for themselves. The only time that they should revert to the best interest of that person is if they cannot ascertain what the desires of the protected person would be. They also should keep very careful records, particularly financial records, as for example, guardians are expected to file an annual report, and conservators are to file an annual accounting of their actions and their financial decisions.

(11:10):

If you are appointed a guardian or conservator, there are certain do's and don'ts you should be aware of. First, do know your authority and any limits that are placed upon it by the judgment that appoints you or the state law. Do communicate and understand the protected person's wishes and desires. Do maximize the independence and self-reliance of the person. Don't make decisions without considering the person or their preferences, and don't take any action that the protected person

can do on their own. The goal is to protect the person while maximizing their autonomy.

(11:49):

This is the time set aside to share stories about people who may be experiencing difficulties making decisions. You may think of stories from your own experiences, or the trainer's guide contains several that you might find useful. Consider each scenario and whether the person needed a guardian, or if they had a guardian, whether the decisions were appropriate.

(12:10):

You may be wondering why we are talking about alternatives to guardianship. This is because state law requires that all **less restrictive alternatives** must be considered before a guardian or conservator can be appointed. Also, research from the National Resource Center for Supported Decision Making found that people with a greater sense of self-determination tend to experience or have healthier lifestyles; more independence; increased motivation; better jobs; and a better ability to recognize and resist abuse.

Now that we have reviewed what guardianship and conservatorship mean in Oregon, let's talk about the available less restrictive alternatives to guardianship or conservatorship. Keep in mind that all of these alternatives can be used in conjunction with guardianship and conservatorship to ensure the protected person is engaged in decision-making about important things in their lives to the fullest extent possible. We will review three categories of supports: safety and wellbeing, medical treatment, and money management. Each section will review alternatives from the least restrictive to the most restrictive in each category.

Speaker 3: Alison Enriquez, Oregon WINGS Steering Committee

Chair (13:24):

Hi, my name is Alison Enriquez. I work with Oregon's Office of Developmental Disability Services at the Oregon Department of Human Services. And so now we're going to talk about some alternatives that can be used more broadly that impact general safety and wellbeing, and could be used to impact either medical or financial decision-making. Some of these options are general practice and some are formal services within the community. They include supported decision-making, case management, direct

care support, and other services available through the Department of Human Services.

So first, **supported decision-making** is an alternative that ensures individuals with disabilities can continue to make decisions about their lives, even if some support or accommodation is needed to do so. With supported decision making, the person remains the decision maker, but uses support to gather information, evaluate options, communicate the decision to others, and other types of supports, but ultimately the person makes the decision.

(14:32):

This sounds pretty familiar because supports to make decisions is something that we all do in our daily lives. It might be for something small, like what to cook or eat for the day; or much bigger decisions, like whether to buy a house and which house to buy; or whether to seek certain healthcare [and] medical treatment. So supported decision-making is increasingly recognized as a reasonable accommodation by banks, schools, medical providers, and courts have even found in certain cases that individuals have not needed a guardian or conservator because they have the right supports and supported decision-

making in place as a reasonable accommodation. Supported decision-making can be done informally or formally with a written agreement that outlines who a person wants to have support them and how they want to be supported.

It's important to keep in mind that decision-making is an important skill to practice. It's a skill that can improve or decline over time. Supported decision-making can be used to develop the skill so that the person can become increasingly independent to make their own decisions. Again, it's important to recognize that supported decision-making can be used as a standalone alternative, or in combination with other options within this presentation. And it can, even should be used if a guardianship, conservatorship, or other more restrictive support option is also in place.

(18:02):

A number of services and supports available through Oregon's Department of Human Services are designed to support individuals to be as independent as possible while living in the community, including the two mentioned in previous slides, including case management services and direct care or personal

care assistance. **Personal care assistance** can be used in a variety of settings, including a person's own home, a provider owned home, a foster home, or provider facility. ODHS also offers a variety of different employment services, including supports to find a job, maintain employment, or advance in your career. The **Employed Persons with Disabilities** or **EPD program**, and also benefits counseling, are designed to support individuals with disabilities to manage important medical benefits while also going to work day. **Day habilitation** includes services and supports to develop skills for participating in the community. There's also caregiver support or respite care. Peer support [and] systems advocacy support is available through the **Independent Living Centers**. And then also ODHS conducts abuse investigations, to ensure people are healthy and safe in the community and able to continue making their own decisions to the extent possible while also preventing abuse.

So all of these options are designed to keep a person as safe, healthy, and independent as possible in the community. They are considered some of the least restrictive alternatives to guardianship, and again, they can be used as standalone support options or in combination with other support options and even

guardianship. So ways to get more information: you could go to Oregon Department of Human Services website, or Oregon's Aging and Disability Resource Connection or ADRC website at www.adrcoforegon.org.

Speaker 1: Brian Marsh, Oregon WINGS Coordinator (20:11):

Please refer to the matchmaking exercise on safety and wellbeing alternatives to guardianship in the trainer guide.

(21:42):

Please see the matching exercise on money management alternatives to guardianship in the trainer's guide.

Please remember that Oregon law affirms that every person has the right to self-reliance and independence, and that all less restrictive alternatives must be considered before a guardian or conservator is appointed. And that just because one incident happens, one financial scam or one home incident, does not mean that a conservatorship or guardianship is needed.

There are some good tools and resources available to help assess options in guardianships, conservatorships, or other alternatives in Oregon. Some tools are shown in this page such as the **Charting**

the Life Course tools from the University of Missouri, Kansas City, or the **American Bar Association's Practical Tool for Lawyers**. There's also the Oregon WINGS publication called **Options in Oregon** to help another person make decisions. These are available in the Trainer Guide and on the Oregon WINGS website, along with other resources.

(22:56):

This activity is an opportunity to think about all the alternatives reviewed today. Please see the scenarios in the trainer guide. Review all of the categories: health and safety, medical, and money management. Consider whether a guardianship or conservatorship should have been awarded, [or] what alternatives could be used as less restrictive options for each person.

Thank you for taking part in this training. We have covered a lot of information and I'm sure that you have questions. Please ask your trainer those questions or refer them to us at Oregon WINGS. You may do so by visiting our website and contacting us through the contact information there. Thank you.